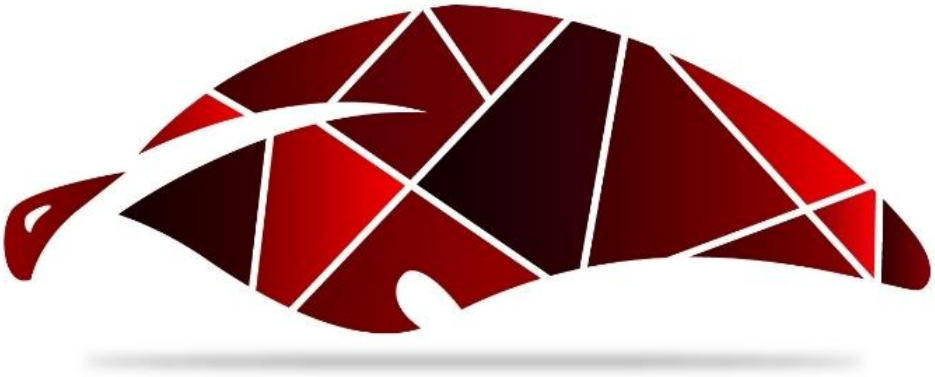

OFIFC

Ontario Federation of
Indigenous Friendship Centres

A Response to Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*

August 2018

About the Ontario Federation of Indigenous Friendship Centres

Founded in 1971, the Ontario Federation of Indigenous Friendship Centres (OFIFC) works to support, advocate for, and build the capacity of member Friendship Centres across Ontario.

Emerging from a nation-wide, grass-roots movement dating back to the 50's, Friendship Centres are community hubs where Indigenous people living in towns, cities, and urban centres can access culturally-based and culturally-appropriate programs and services every day. Today, Friendship Centres are dynamic hubs of economic and social convergence that create space for Indigenous communities to thrive. Friendship Centres are idea incubators for young Indigenous people attaining their education and employment goals, they are sites of cultural resurgence for Indigenous families who want to raise their children to be proud of who they are, and they are safe havens for Indigenous community members requiring supports.

In Ontario more than 85 per cent of Indigenous people live in urban communities. The OFIFC is the largest urban Indigenous service network in the province supporting this vibrant, diverse, and quickly-growing population through programs and initiatives that span justice, health, family support, long-term care, healing and wellness, employment and training, education, research, and more.

Friendship Centres receive their mandate from their communities, and they are inclusive of all Indigenous people – First Nation, Status/Non-Status, Métis, Inuit, and those who self-identify as Indigenous.

Introduction

The OFIFC is pleased to share our submission on the proposed Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 2018.*

While many of the provisions within the omnibus bill are welcome legislative changes, the OFIFC is disappointed that the federal government has not made any progress on criminal reform promises related to mandatory minimum sentences that disproportionately affect Indigenous accused. The Truth and Reconciliation Commission (TRC) of Canada released its Final Report and 94 Calls to Action on December 15, 2015. The OFIFC is seriously concerned with the federal government's lack of progress on Call to Action #32:

> 32. We call upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.[1]

[1] Truth and Reconciliation Commission of Canada. (2015). 'Calls to Action.' Retrieved from: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

The federal government's inaction on departing from mandatory minimum sentences is disappointing and fails to ameliorate the disproportionate number of Indigenous people serving time in sentenced custody.

Our submission provides an analysis of the legislation with key recommendations, outlining the steps necessary to affect meaningful change within the justice system.

Analysis of Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*

Bail and Administration of Justice Reforms:

Bail Reform (sections 212, 214, 217, 227-229):
The OFIFC is pleased with the bail reforms outlined in Bill C-75 that seek to address the disproportionate number of Indigenous individuals denied bail and remanded into custody. Specifically, Indigenous people are represented in the provincial and territorial correctional systems at 25 percent of all adult admissions to remand.[2] The proposed amendments legislate a "principle of restraint" for police and courts to ensure that release is favoured over detention and that the least onerous conditions, that are appropriate in the circumstances, are applied to the accused.[3] The peace officers and courts will be required to consider the circumstances of Indigenous accused persons and other vulnerable populations for the remedial application of pre-trial release.[4] These amendments are intended to address onerous bail conditions (no consumption of alcohol, curfews, residing at a particular address, sureties etc.) that may set-up an accused to fail and increase their susceptibility for incurring additional charges.

In Ontario, the practice of mandating a surety upon release has become common practice, despite it being "one of the most onerous types of release."[5] The proposed reforms to bail benefit Indigenous people who must travel away from their communities to access base courts and do not readily have access to the supports of their families and communities to act as sureties and support the conditions of release.

Administration of Justice Offences (sections 214 and 236):
The legislation enhances police and prosecutorial discretion for proceedings related to failure to comply with release conditions. The legislation also provides an avenue to compel an accused to appear at a judicial referral hearing as an alternative to laying charges, when there has been a breach of justice. The OFIFC is supportive of the

[2] Statistics Canada. 2017 Trends in the use of remand in Canada, 2004/2005 to 2014/15. Retrieved from: https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14691-eng.pdf
[3] Bill C-75: *An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. 2018. (Section 212) Retrieved from: http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading
[4] Ibid.
[5] John Howard Society of Ontario. (September 2013). "Reasonable Bail?" 7.

proposed reforms for proceedings related to bail and the AOJ that are intended to reduce the number of individuals in pre-trial custody, minimize bail release conditions, and reduce the number of AOJ charges related to release conditions.

> In 2014, about one in ten *Criminal Code* offences reported by police was an offence against the AOJ. In adult criminal courts, over one-third of all completed cases involved at least one AOJ charge.[6]

The Indigenous Courtwork program has historically reported a significant number of AOJ charges for Indigenous individuals supported through the program. Courtworkers often describe that housing insecurity, barriers to transportation, lack of access to a phone, and ongoing experiences of precarity impact Indigenous peoples' continued engagement with the criminal justice system. The root causes of these specific barriers stem from experiences of poverty, anti-Indigenous racism, and living under colonial policies which affect the quality of life of Indigenous people. The fact that the justice system is structured in such a way that it has not taken into account Indigenous people's specific circumstances has resulted in a system which essentially criminalizes poverty-related challenges through AOJ charges. Reforms to bail conditions and AOJ charges that are aimed at reducing the ongoing interactions of Indigenous peoples with the criminal justice system are indeed very welcomed and long overdue.

Intimate Partner Violence (sections 1(3), 95(2), 99, 227(3) & (6), 296 and 297):
The amendments in Bill C-75 create a reverse onus at bail for accused individuals charged with a violent offence involving an intimate partner, if they have a prior conviction of violence against an intimate partner. The legislation clarifies that the courts may impose a maximum term of imprisonment for an accused charged with an indictable offence against an intimate partner with a previous conviction of IPV, which is more than the maximum term of imprisonment for that offence—as long as it is within the outlined guidelines for maximum penalties related to IPV (see section 297). Bill C-75 takes a hard stance on the criminalization of IPV in an effort to reduce recidivism rates.

Indigenous people are more likely than non-Indigenous people to report being a victim of IPV.[7] The OFIFC is a leader in ending violence against Indigenous women and girls and by addressing the root causes of IPV through providing culture based programming. The OFIFC's Kizhaay Anishinaabe Niin ("I Am a Kind Man") program works with Indigenous men and youth in understanding violence against Indigenous women and engaging them in joining together to end violence. The program links experiences of colonialism and intergenerational trauma as impacting the perpetration of violence, and works toward changing attitudes about women and intimate relationships within Indigenous communities. The Kizhaay Anishinaabe Niin program

[6] Burczycka, M. and C, Munch. (2015). *Trends in offences against the administration of justice.* Statistics Canada, Catalogue no. 85-002-x. Retrieved from: https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14233-eng.pdf
[7] Perreault, Samuel. (2011). "Violent victimization of Aboriginal people in the Canadian provinces, 2009." Statistics Canada. Retrieved from: https://www150.statcan.gc.ca/n1/pub/85-002-x/2011001/article/11415-eng.htm

promotes family and community safety rooted in cultural teachings and practices. The OFIFC views culture and community driven programming as the necessary approach to meaningfully address experiences of IPV and support the healing of Indigenous communities. The OFIFC has advocated for the use of the Kizhaay Anishinaabe Niin program as a court-sanctioned Partner Assault Response (PAR) Program equivalent to address recidivism rates of IPV in Indigenous communities. In communities where Kizhaay Anishinaabe Niin has been approved as a court-ordered PAR program equivalent for Indigenous men and youth, participants and instructors have reported higher effectiveness and greater outcomes than mainstream programming. It is recommended that the federal government invest in the development and implementation of Indigenous-specific PAR programming nationally to meaningfully address the issue of IPV in Indigenous communities and create pathways for healing that are community-led. It is also recommended that Indigenous-specific PAR programming be offered in corrections, in all regions, to begin the healing process prior to release. It is essential that Indigenous specific PAR programming be offered in correctional facilities and in Friendship Centre communities so that the healing process is maintained to support community reintegration and to reduce recidivism rates.

Youth Criminal Justice Act (sections 364-366, 370-372, 374-378):

Bill C-75 includes proposed amendments to the *Youth Criminal Justice Act* (YCJA), incorporating the use of extrajudicial measures as an alternative to laying charges for breach of conditions and failure to appear at the bail stage—unless the youth has a history of failures or refusals, or the young person risks harm to the safety of the public. The legislation also prohibits the use of detainment of a young person in custody, or the use of a release order with undertakings as a substitute for "appropriate child protection, mental health, or other social measures."[8] The amendments to the YCJA include the court's discretion to impose more onerous conditions at the time review, for youth sentences not involving custody, if a youth has breached a condition of release. The maximum sentence lengths outlined in YCJA do not change under Bill C-75.

The OFIFC agrees with reforms that encourage the use of extrajudicial measures. The OFIFC recommends that the circumstances of Indigenous youth be considered for the application of extrajudicial measures and that they must include referrals to programming that is designed and delivered by Indigenous communities and organizations. Urban Indigenous youth should to be referred to Indigenous organizations like Friendship Centres, as it is vitally important for Indigenous children and youth to access prevention programming that promotes youth resiliency through fostering wellbeing through wraparound supports, basic needs, and skills development. In Ontario, Friendship Centres offer the youth specific Wasa-Nabin program that has a specific mandate to support Indigenous youth with institutional interventions through providing peer mentoring, case management, and advocacy supports. The federal government should invest in prevention programming and the expansion of youth

[8] Bill C-75: *An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. 2018. (Section 364) Retrieved from: http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading

diversion programming that is focused on supporting youth resiliency and is designed and delivered by Indigenous organizations and communities.

Criminal Justice System Efficiency Measures:

Guilty Pleas (clause 270):
Bill C-75 proposes to amend plea provisions of the *Criminal Code* to require the court to be satisfied that the facts support the charge, as a condition of accepting a guilty plea. The OFIFC is concerned with the numbers of Indigenous accused who falsely accept guilty pleas during their engagement process with the criminal justice system. Indigenous people are more likely to be denied bail and recent research has linked the use of pre-trial detention as impacting an individual to be twice as likely to enter a guilty plea, regardless of their level of guilt.[9] The Research and Statistics Division at the Department of Justice Canada conducted interviews with justice system professionals (Courtworkers, lawyers, etc.) to gather information related to false guilty pleas. "Participants described clients frustrated with court delays and adjournments who plead guilty without obtaining legal representation or reviewing the disclosure."[10] This research demonstrates linkages between securing adequate legal representation as a mitigating factor in entering a guilty plea.[11] Barriers to acquiring Legal Aid also include accessibility barriers such as the process being difficult to navigate for individuals who do not have access to a phone or computer.[12]

Discussions around streamlining court processes need to ensure that Indigenous individuals have adequate access to legal representation throughout the duration of their case to address false guilty pleas.

> *Cases with intermittent legal representation required, on average, 298 days to reach conclusion. In comparison, cases with total representation took an average of 160 days and those with no representation took an average of 189 days to reach completion.*[13]

Indigenous people require consistent legal representation during their engagement with the criminal justice system to fully understand the charge(s), disclosure and process to make a fully informed decision about their case. Enhanced investments in legal services such as the national Indigenous Courtwork program, Legal Aid, and Indigenous Peoples Courts are vitally important in addressing barriers that marginalized Indigenous peoples in their interactions with the criminal justice system. Meaningful amendments to the criminal justice system are urgently needed to reduce the number of Indigenous

[9] Bressan, Angela. and Kyle, Coady. (2017). "Guilty pleas among Indigenous people in Canada." Department of Justice Canada. Retrieved from: http://publications.gc.ca/collections/collection_2018/jus/J4-62-2017-eng.pdf. 10.
[10] Ibid. 10.
[11] Ibid.
[12] Ibid.
[13] JustFacts. (2017). Jordan: Statistics Related to Delays in the Criminal Justice System. Retrieved from: http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/dec01.pdf

individuals in remand and sentenced custody, which includes repealing mandatory minimum sentences that directly impact the efficiency of court proceedings.

> *The median case processing time for mandatory minimum penalty charges shows a general increasing trend over time. Between 2000/2001 and 2013/2014, the number of days from first appearance to decision increased 54 percent, from 208 days to 321 days.*[14]

The OFIFC recommends the removal of mandatory minimum sentences as a critical step in addressing criminal justice delays that may breach an individual's *Charter* protected right for the "right to a trial within a reasonable time" (section 11(b)).[15] Removing mandatory minimum sentences supports addressing the overrepresentation of Indigenous people in the criminal justice system through increasing the ability to divert charges out the justice system. Indigenous community justice diversion programs provide culturally specific and community determined responses for justice.

Routine Police Evidence (sections 278 and 294):
Bill C-75 proposes to allow routine police evidence to be presented to the court via an affidavit or solemn declaration. The court will have the discretion to admit the evidence or to require the attendance of the police officer for cross-examination. The OFIFC is troubled by this proposed amendment and its potential impacts for Indigenous people and the risks for the miscarriage of justice. Indigenous people experience over-policing and discrimination due to historical colonial assimilation practices and ongoing anti-Indigenous racism. This amendment allows police to shape the written narrative and removes the practice of cross-examination, which may highlight discrepancies and discriminatory biases. The OFIFC recommends that the provisions regarding the admissibility of "routine police evidence" be removed from Bill C-75.

Remote Appearances (sections 1(2), 190, 218, 227(2), 293, 295):
The legislation introduces the use of audioconference and videoconference in criminal cases to support remote appearances for all individuals involved in criminal cases, including a judge or justice, throughout the criminal justice process. Distance technologies address barriers for individuals to access the criminal justice system, which is particularly critical for Indigenous people who experience financial hardships due to the costs incurred from travelling from remote communities to access base courts.

Of concern to the OFIFC is that remote appearance technologies may hinder an Indigenous individual's access to adequate legal representation, resources, and referrals offered through the Indigenous Courtwork program. The Indigenous Courtwork program supports individuals and families to navigate the justice system through: understanding a charge, supporting with Legal Aid applications, and ensuring that the

[14] JustFacts. (2017). Jordan: Statistics Related to Delays in the Criminal Justice System. Retrieved from: http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/dec01.pdf
[15] *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11.

background of an Indigenous accused is acknowledged in the court proceedings. It is the OFIFC's recommendation that Courtworkers (where available) be provided with advanced notice of videoconferencing court for Indigenous accused. Incorporating Indigenous Courtworkers in remote appearance hearings will also be of particular importance for those retained in custody who may need support securing legal representation.

Peremptory Challenges (section 638(1)):
The amendments in Bill C-75 reform the jury selection process outlined in section 634 of the *Criminal Code* through the removal of peremptory challenges. Bill C-75 proposes to do away with peremptory challenges for the defence and for the Crown. The OFIFC is pleased with this amendment as it aligns with Justice Frank Iacobucci's recommendation #15 in the report entitled "First Nations Representation on Ontario Juries" 2013, which called for amendments in the use of peremptory challenges that discriminate against Indigenous people serving on juries.[16]

Although the removal of peremptory challenges is an important step, there is significant legislative work that needs to be done to increase the diversity of jury pools to include Indigenous peoples, and ensure that jury service is economically viable for everyone. The OFIFC echoes the recommendations outlined in the "Debwewin Jury Review Implementation Committee Final Report" (2018) regarding the selection and compensation of jurors. Therefore, the OFIFC asks the federal government to consider legislative reforms that call upon provincial governments to ensure that their jury selection process maintains effective mechanisms for including First Nation communities in the selection process. The Dewewin Report's recommendation # 16, calls for current jury compensation to be consistent with cost-of living increases.[17] The OFIFC asks the federal government to legislate a model of jury compensation that is based on each province's minimum wage rate.

Other Amendments:

Victim Surcharge (Bill C-28) and Bill C-75 (sections 340):
The proposed amendments aim to restore judicial discretion for the imposition of the victim surcharge. The OFIFC advocates for the removal of the blanket victim surcharge and is pleased that Bill C-75 provides guidance to the courts on what constitutes undue hardship. Indigenous people are disproportionately impacted by victim surcharges because they experience higher rates of poverty and homelessness.[18] The OFIFC

[16] Iacobucci, Frank. "First Nations Representation on Ontario Juries." (2013). Ministry of the Attorney General. Retrieved from: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html
[17] Debwewin Jury Review Implementation Final Report (2018). Retrieved from: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/debwewin/
[18] Rudin. Jonathan. (2018). "For the justice system to serve indigenous people, it need radical forms including Indigenous justice systems. This requires political will and funding." Policy Options. Retrieved from: http://policyoptions.irpp.org/magazines/april-2018/the-injustice-system-and-indigenous-people/

advocates for the unique circumstances of Indigenous individuals be considered for the application of victim surcharge(s).

Exploitation and Trafficking in Persons (Bill C-38):
Bill C-75 would facilitate bringing into force Bill C-38 through amendments that prosecute human tracking by applying a reverse onus to proceedings for the forfeiture of proceeds of crime.

Indigenous women, girls, and two-spirited individuals are particularly vulnerable to becoming victims of human trafficking. Driving factors of this increased vulnerability include poverty, interactions with the child welfare system, and being removed from one's community. The child welfare system has been described as a "pipeline to child exploitation, sex trafficking and murdered and missing Indigenous women and girls."[19] The OFIFC agrees with this legislative measure as it targets the beneficiaries of human trafficking offences and recognizes the power imbalance between traffickers and victims. Given the disproportionate rate at which Indigenous women, girls, and two-spirited individuals are victimized by trafficking, it is imperative that the federal government invest in a national strategy to combat the crisis.

Conclusion and Summary of Recommendations

In order for governments to address the TRC's Calls to Action there will need to be radical reforms to justice legislation. The OFIFC is seriously concerned with the federal government's lack of action on Call to Action #32, which calls on the federal government to amend the *Criminal Code* to depart from mandatory minimum sentences. As it stands, the Canadian government has not adequately committed to a path of reconciliation with Indigenous communities. Criminal justice reforms and further amendments are required within Bill C-75 to make a marked difference for Indigenous people and communities.

In addition to addressing the gaps we have identified within the legislation, the OFIFC provides the following specific recommended amendments to the proposed Act:

The OFIFC recommends that the federal government:

1. Invest in federal and provincial cost-sharing agreements to expand the Kizhaay Anishinaabe Niin program as a court-sanctioned PARS program. The Kizhaay Anishinaabe Niin program meaningfully addresses the perpetration of IPV through providing cultural teachings that promote family and community safety. Additionally, ensure that Indigenous-specific PARS programming is offered in corrections, in all regions, to begin the healing process prior to release. An Indigenous-specific culture based approach to IPV offered in correctional facilities and in Friendship Centre communities will ultimately address recidivism rates.

[19] Palmater, Pamela. (2017). From foster care to missing or murdered: Canada's other tragic pipeline." Macleans. Retrieved from: https://www.macleans.ca/news/canada/from-foster-care-to-missing-or-murdered-canadas-other-tragic-pipeline/

2. Expand critical legal services for Indigenous peoples: Legal Aid, the Indigenous Courtwork program, Community Justice Programs, and Indigenous Peoples Courts. Indigenous people require support navigating the criminal justice system, adequate legal representation, and the application of Gladue principles throughout their engagement with the criminal justice system.

3. Legislate that courts and peace officers be required to consider the circumstances of Indigenous youth in the application of extrajudicial measures. Indigenous youth need to be referred to Indigenous organizations and Friendship Centres to access programming that is designed and delivered by Indigenous communities.

4. Recognize and invest in Friendship Centres as critical players in Indigenous justice practices. Expand the federal and provincial cost-shared Community Justice Program as a method of diverting pre-and post-charges away from the criminal justice system and positioning Indigenous communities as the stakeholders in the application of justice.

5. Legislate reforms to the jury selection processes to include a directive for provinces to ensure the maintenance of effective mechanisms for including Indigenous communities on the jury roll. Legislate a model for jury compensation that is adequate and based on each province's minimum wage rate.

6. Remove Bill C-75 sections 278 and 294 about the admission of Routine Police Evidence, as these amendment create risks for the miscarriage of justice. Indigenous people experience over-policing and discrimination due to historical colonial assimilation practices and ongoing anti-Indigenous racism. This amendment allows police to shape the written narrative and removes the practice of cross-examination, which may highlight discrepancies and discriminatory biases.

7. Repeal mandatory minimum sentences as they disproportionately impact Indigenous people who are vulnerable to criminalization and are already overrepresented in sentenced custody.

8. Invest in a national strategy to combat human trafficking. Indigenous women and two-spirit individuals are disproportionately vulnerable to human trafficking due to colonial history of residential schools and the ongoing removal of children from their communities in the child welfare system.

9. Release transparent annual reports tracking the government's progress in ending the overrepresentation of Indigenous peoples within federal corrections